

REMARKS

This Response is submitted in reply to the non-final office action mailed May 8, 2007. Claims 1-20 are pending in this application. In the Office Action, Claims 1-20 are rejected under 35 U.S.C. §103. No fee is due in connection with this Response. The Director is authorized to charge any fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-574 on the account statement.

In the Office Action, Claims 1-5 and 11-20 are rejected under 35 U.S.C. §103(a) as being unpatentable over GB 2,033,721 to Ripper ("*Ripper*") in view of U.S. Patent No. 2,835,590 to Rusoff ("*Rusoff*"). For the reasons set forth below, Applicants respectfully submit that the rejection be withdrawn.

Independent Claims 1, 12-13, 16, 18 and 20 are directed, in part, to a process or method for manipulating the flavor of chocolate which comprises, for example, utilizing a conventional process for manufacturing the chocolate; and adding a flavor effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass thus manipulating its flavor. Specifically, the chocolate is made by a standard process using conventional ingredients well known to persons skilled in the art. For example, the Background section of the specification describes several traditional methods of producing "chocolate," which includes standard chocolate as well as substitute chocolate such as compound, couvertures or ice cream coatings. See, Specification, page 1, lines 25-26.

Independent Claim 11 is directed, in part, to a process for manipulating a flavor of a single mass of chocolate, which comprises, for example, utilizing a conventional process for manufacturing the chocolate; and adding a flavor effective amount of a non-cocoa/dairy flavor to the chocolate mass. Moreover, independent Claims 14-15 are directed, in part, to a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor attribute. Applicants respectfully submit that the cited references are not combinable and, even if combinable, the cited references fail to disclose every element of the present claims.

Applicants respectfully submit that one having ordinary skill in the art would not have reason to combine *Ripper* and *Rusoff* to arrive at the present claims. For example, *Ripper* is entirely directed to a method of manufacturing chocolate by avoiding the traditional conching

step normally conducted during traditional chocolate manufacturing. In contrast, the present claims recite using a conventional process for manufacturing chocolate, where several traditional methods of making chocolate are described in the Background of the Invention, all of which involve conching. Because *Ripper* teaches a simpler, quicker, non-traditional method of producing chocolate, it teaches away from the present claims.

Further, *Rusoff* teaches away from present invention because *Rusoff* is directed to an artificial chocolate flavor that serves as a substitute for cocoa as the source of chocolate flavor. More specifically, *Rusoff* teaches an artificial chocolate flavor being employed as either a substitute for natural chocolate flavor or as a fortifier or extender of natural chocolate flavor. See, *Rusoff*, column 4, lines 47-49. In contrast, the present claims are directed to flavor attributes that are defined in the specification as flavor attributes other than the mere enhancement of the chocolate flavor. See, specification, pages 4-6. As a result, all the independent claims recite a non-cocoa/dairy flavor or flavor attribute. Moreover, independent Claims 1, 11 and 12 teach manipulating chocolate flavor instead of fortifying, substituting, or extending; independent Claims 13 and 14 teach a flavor attribute of chocolate other than chocolate flavor enhancement; independent Claim 15 lists specific attributes; and independent Claims 16 and 18 each require a specific attribute. Because *Rusoff* discloses a substitute for cocoa to enhance chocolate flavor, *Rusoff* teaches away from the present claims. Because the cited references teach away from the claimed invention, the skilled artisan would have no reasonable expectation of success in combining the cited references to arrive at the present claims.

Applicants respectfully submit that references must be considered as a whole and those portions teaching against or away from the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443 (Fed. Cir. 1986). “A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant.” *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998) (quoting *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994)).

In its attempt to arrive at the present claims by combining the cited references, the Patent Office has ignored significant portions of each reference that teach away from the combination. Rather, what the Patent Office has done is to rely on hindsight reconstruction of the claimed invention. Applicants respectfully submit that it is only with a hindsight reconstruction of Applicants' claimed invention that the Patent Office is able to even attempt to piece together the teachings of the prior art so that the claimed invention is allegedly rendered obvious. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075 (Fed. Cir. 1988).

Applicants also respectfully submit that, even if combinable, the cited references both fail to disclose or suggest every element of the present claims. For example, *Ripper* fails to disclose a non-cocoa/dairy flavor or flavor attribute as required, in part, by the present claims. The Patent Office admits the same. See, Office Action, page 3, lines 2-4. Moreover, *Rusoff* fails to remedy the deficiency of *Ripper* because *Rusoff* teaches enhancing or extending chocolate flavor by substituting cocoa with an artificial chocolate flavor. The Patent Office also admits the same in attempting to establish its obviousness argument. See, Office Action, page 3, lines 11-13. By being directed to non-cocoa/dairy flavor and flavor attributes, the present claims seek not to simply boost the existing chocolate flavor, as is the case in *Rusoff*, but rather to manipulate the flavor by adding non-cocoa/dairy flavors. Therefore, even if combinable, the cited references both fail to teach the non-cocoa/dairy flavor or flavor attribute as required of the present claims.

In the Office Action, Claims 1-4, 6 and 10-20 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Ripper* in view of U.S. Patent No. 3,769,030 to Kleinert ("*Kleinert*") or U.S. Patent No. 5,676,993 to Watterson ("*Watterson*"). Applicants respectfully submit that one having ordinary skill in the art would not have reason to combine the cited references to arrive at the present claims. As discussed above, *Ripper* teaches a simpler, quicker, non-traditional method of producing chocolate by eliminating the conching step used in conventional chocolate manufacturing processes. Similarly, *Kleinert* is directed to a method for the fabrication of chocolate paste, especially milk chocolate paste, wherein cocoa is deodorized and the paste

obtained by incorporating the deodorized cocoa is finished without conching. Therefore, the aim of *Kleinert* is also to avoid the conching step which is normally carried out during traditional chocolate manufacturing. Therefore, both *Ripper* and *Kleinert* teach away from the present claims, which are directed to a traditional process of producing chocolate.

Further, *Watterson* also teaches away from present invention because *Watterson* discloses a process for enhancing cocoa flavor in a fat matrix. The Patent Office admits the same. See, Office Action, page 6, lines 3-12. In the specification, *Watterson*, clearly discloses that a main objective of the invention would be to enhance cacao flavor in order to utilize more of the less expensive beans without sacrificing flavor quality. See, *Watterson*, column 3, lines 24-27. In contrast, however, the present claims recite manipulating a chocolate flavor by adding non-cocoa/dairy flavor or flavor attributes. Moreover, and as described above, the present claims are directed toward flavor attributes that are defined in the specification as flavor attributes other than the mere enhancement of the chocolate flavor. See, specification, pages 4-6. *Watterson*, therefore, teaches away from the present invention, which requires, in part, a chocolate mass that comprises a non-cocoa/dairy flavor or flavor attribute that is added to chocolate.

Applicants respectfully submit that the Patent Office, via its remarks regarding *Rusoff* and *Watterson*, has either mischaracterized the references cited or misunderstood the present claims. By citing both these references in attempting to substantiate the obviousness rejection, both of which are directed to enhancing or boosting chocolate flavor, the Patent Office has noted the exact distinction Applicants describe between these references and the present claims. While these references, as admitted by the Patent Office, are directed to enhancing or boosting chocolate flavor, the present claims recite manipulating flavor using a non-cocoa/dairy flavor or flavor attribute. Moreover, Claims 13 and 14 specifically recite adding a non-cocoa/dairy flavor or flavor attribute having a flavor attribute associated with chocolate other than chocolate flavor enhancement.

Because the cited references teach away from the claimed invention, the skilled artisan would have no reasonable expectation of success in combining the cited references to arrive at the present claims.

Further, even if combinable, the cited references fail to teach a non-cocoa/dairy flavor or flavor attribute as required, in part, by the present claims. As discussed above and admitted by

the Patent Office, both *Ripper* and *Watterson* are deficient in this manner. Moreover, *Kleinert* fails to remedy this deficiency, because *Kleinert* teaches a chocolate flavor based upon a deodorized cocoa treated with a carbohydrate-protein additive mixture. As a result, *Kleinert* teaches a cocoa flavor rather than the non-cocoa/dairy flavor or flavor attribute of the present claims. Accordingly, even if combinable, the cited references fail to teach the non-cocoa/dairy flavor or flavor attribute as required of the present claims.

In the Office Action, Claim 7 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Ripper* in view of *Rusoff* as applied to claims 1-5 and 11-20 above, and further in view of U.S. Patent 4,343,818 to Eggen ("*Eggen*"). Further, Claims 8 and 9 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Ripper* in view of *Rusoff* as applied to claims 1-5 and 11-20 above, and further in view of U.S. Patent 5,888,562 to Hansen ("*Hansen*"). The Patent Office relies on *Eggen* to arguably teach elements of dependent Claim 7 and *Hansen* to arguably teach elements of dependent Claims 8 and 9, all of which are dependent on Claim 1. Therefore, *Eggen* and *Hansen* fail to remedy the deficiencies of *Ripper* and *Rusoff* as it relates to independent Claim 1.

For at least the reasons discussed above, the cited art fails to render obvious the claimed subject matter. Accordingly, Applicants respectfully request that the obviousness rejections with respect to Claims 1-20 be reconsidered and the rejections be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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